Supreme Court, U.S.
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No. 91-1584

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HARRIET RIMELL,
Petitioner

vs.

MARK TWAIN BANK; FIRST BANK; PIONEER BANK,
Respondents.

ALBERT RIMELL,
Petitioner

vs.

MARK TWAIN BANK; FIRST BANK; MERCANTILE BANK, N.A.; BOATMEN'S BANK,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement Of The Case

The issue is whether 16 debts Petitioners owe the creditor banks are subject to a bona fide dispute,

within the meaning of 11 U.S.C. § 303(b)(1). Petitioners admitted the execution of the notes in question by various partnerships or corporations with which they were affiliated. Petitioners also admitted executing the guarantees or the notes which form the basis for their liability. Petitioners also admitted that there was a balance due on each of the 16 loans.

The terms of each note and each guarantee unconditionally obligated Petitioners to pay the balance due. Petitioners claim that this promise is disputed, because the banks "orally agreed" to extend the loans, on terms more favorable to the borrowers, until the underlying collateral was sold. The courts below held that an objective person would not find this sort of creative defense to give rise to a bona fide dispute.

Petitioners are currently under indictment in the United States District Court for the Eastern District of Missouri, for committing bank fraud in connection with these loans, and bankruptcy fraud in connection with these proceedings.

Reasons Why The Writ Should Be Denied

I. The Court Below Defined "Bona Fide Dispute" In Accordance With A Uniform Standard Applied By Every Other Circuit Court.

This Petition asserts that the lower courts have developed "five different definitions" of "bona fide dispute," as used in 11 U.S.C. 303(b)(1). Pet. at 17. In fact, the Circuit Courts have developed a uniform test: whether there is "an objective basis for either a factual or a legal dispute as to the validity of the debt." Matter of Busick, 831 F.2d 745, 750 (7th Cir. 1987). That is the standard adopted by the Court below, App. 72-73, as well as the three other Circuit Courts to consider the issue.

The origin of this standard is In Re Lough, 57 B.R. 993 (Bankr. E.D. Mich 1986). Lough contains an extensive analysis of both the legislative history

and prior caselaw. Since 1986, the federal courts have uniformly followed Lough -- and rejected the earlier cases on which Petitioners base their claim of confusion. Pet. at 18-22.

In Busick, the Seventh Circuit found that the Lough standard was "the formulation most compatible with the Congressional intent." 831 F.2d at 749. In Bartmann v. Maverick Tube Corp., 853 F.2d 1540, 1543-44 (10th Cir. 1988), the Tenth Circuit chose "to adopt the standard propounded by the Seventh Circuit." In B.D.W. Associates v. Busy Beaver Building Centers, 865 F.2d 65, 65-66 (3d Cir. 1989), the Third Circuit adopted the Lough standard as set forth in Busick. In the instant case, the Court of Appeals agreed with the Seventh Circuit that this "objective inquiry" "best effectuates Congress'

intent," App. 73, and expressly adopted it. No Circuit Court has reached a contrary conclusion.

Petitioners assert that B.D.W. Associates "misread" the Seventh Circuit's decision in Busick, by requiring that the dispute be "substantial." Pet. at 26-27. This semantic quibble hardly rises to the level of a circuit conflict as described in this Court's Rule 10.1(a). In applying the standard, the Busick court held there was a "bona fide dispute," because debtor had raised "substantial legal questions" regarding her liability. 831 F.2d at 750. To an objective person, an "insubstantial" legal or factual dispute is not "bona fide." See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986) (evidence not "significantly probative" will not prevent summary judgment).

Petitioners' real argument is that the Court below improperly applied the uniform Lough standard to the particular facts of this case. Pet. at 27-41. Alleged errors in applying the law to the facts do not warrant review by this Court. United States v. Johnston, 268 U.S. 220, 227 (1925).

II. The Court Below Properly Applied The Uniform Lough Standard To The Facts Of The Instant Case.

Petitioners' principal argument is that they establish a bona fide dispute merely by proving that a Missouri trial court declined to grant summary judgment against them. Pet. at 29-20; 40-41. That proposition would astound anyone familiar with the vagaries of Missouri trial practice.

Rule 74.04 of the Missouri Rules of Civil Procedure tracks the language of Rule 56 of the Federal Rules of Civil Procedure. Missouri courts, however, interpret the state rule in far more restrictive terms. Under Missouri law, summary judgment is a "drastic remedy bordering on the denial of due process." Merrick v. Southwest Electrical Co-operative, 815 S.W.2d 118, 123 (Mo. App. 1991); King General Contractors, Inc. v. Reorganized Church Of The Latter Day Saints, 821 S.W.2d 495, 499 (Mo. banc 1991). Even the "slightest doubt" about a fact warrants denial of summary judgment. Kansas City v. W.R. Grace & Co., 778 S.W.2d 264, 268 (Mo. banc 1987). In the face of these pronouncements, it is a bold trial judge indeed who

will grant summary judgment -- whether there is a bona fide dispute or not.

An objective person reviewing the facts of this case would instantly conclude that Petitioners' defenses were frivolous. Under Missouri law, the creditor banks made a prima facie case by proving that Petitioners executed the notes or guarantees in question and that a balance was due. Bank of Brookfield-Purdin v. Burns, 724 S.W.2d 262, 264 (Mo. App. 1986). As Petitioners conceded both issues, App. 30, they had the burden of proffering some plausible affirmative defense in order to present a "bona fide dispute."

Their "defense" consisted of the allegation that each of the creditor banks had "orally agreed" to "continually extend" the loans, on terms more

favorable to the borrowers, until the borrowers sold the collateral for the loans. App. 31-32. Since most banks expect to be repaid, an objective observer would regard this "defense" with more than a little skepticism. Skepticism would become outright disbelief when that observer realized, as did the courts below, that:

A. Each of the original obligors had filed for bankruptcy, and listed each of these claims as undisputed;

B. In depositions before the hearing, Mr. Rimell had admitted that there were no such "agreements";

C. There was no documentary evidence of any of these "agreements";

D. Representatives of the creditor banks vigorously denied any such "agreement"; and

E. Oral modifications to unambiguous guarantees violate Missouri's parol evidence rule.

Petitioners apparently believe that any theory supported by any testimony, no matter how frivolous, automatically creates a "bona fide dispute." That has never been the law. Bell v. Hood, 327 U.S. 678, 682-83 (1946); United States ex rel. Mayo v. Satan And His Staff, 54 F.R.D. 282 (W.D. Pa. 1971).

Petitioner's proposed defense is frivolous on its face. An objective person would conclude that any such "oral agreement" was a figment of their fertile imagination. Petitioner's recent indictment for, inter alia, defrauding each of the creditor banks and

defrauding the bankruptcy court merely confirms that conclusion.

Conclusion

For these reasons, Mark Twain Bank respectfully prays that the Court deny the Petition.

Respectfully Submitted,

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